MISCELLANY.

(Blue Sky Laws.)—In a number of jurisdictions laws have been passed to regulate the sale of foreign securities and afford full information to prospective investors therein. Several of these have been held to be unconstitutional usually on the ground that in so far as they regulate the conduct of individuals they are an encroachment on the commerce power of Congress (see Bracy *v.* Darst, 218 Fed., 482). On the other hand, acts restricted in their operation to corporations have been sustained (Ex p. Taylor, 68 Fla. 61, Ann. Cas., 1916A, 701). It is probable that the entire question will soon be passed on by the Federal Supreme Court and that future legislation will be adapted to the requirements of its decision. To a Canadian contemporary (36 Canadian L. Times, 37) we are indebted for the following explanation of the colloquial designation "blue sky" law which has become affixed to legislation of this kind: "The State of Kansas, most wonderfully prolific and rich in farming products, has a large population of agriculturists not versed in ordinary business methods. This State was the hunting ground of promoters of fraudulent enterprises; in fact their frauds became so barefaced that it was stated that they would sell building lots in the blue sky in fee simple. Metonymically they became known as blue sky merchants, and the legislation intended to prevent their frauds was called Blue Sky Law." According to the same authority similar legislation has been adopted in England and in Ontario, British Columbia, Saskatchewan, Alberta and the Yukon. In those jurisdictions, of course, the constitutional limitation which has nullified most of the efforts of American legislatures to interpose a barrier between the stock salesman and his prey is not to be reckoned with. It is really hard to understand how those people manage to get along without a constitution—(Law Notes, May, 1916.)

In Geiger-Jones Co. *v.* Turner, and two other cases in the United States District Court, S. D. Ohio, E. D. (February, 1916, 230 Fed., 233) the Ohio Blue Sky Law was held unconstitutional because imposing direct and substantial burdens on interstate commerce, and because offending against the Due Process of Law and Equal Protection of the Law clauses of the Fourteenth Amendment. The opinion of the district judge is very elaborate and cites many authorities from other jurisdictions.

Inns and Innkeepers—Loss of Baggage—Degree of Care—What Constitutes Relation.—Parker *v.* Dixon (Minn.), 157 N. W. 583. In the principal case the court uses the following language:

"An innkeeper is answerable for the loss in his inn of the goods of his guest, unless the loss arises from the negligence of the guest,

or the act of God or of a public enemy. Lusk *v.* Belote, 22 Minn. 468; Johnson *v.* Chadbourn Finance Co., 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571; Mason *v.* Thompson, 9 Pick. (Mass.) 280, 20 Am. Dec. 471.

"This rigorous rule of liability arises only in favor of guests. The relation of innkeeper and guest is a mutual one, involving mutual rights and obligations. It involves the obligation to furnish accommodation and care on the part of the innkeeper, and the obligation to pay on the part of the guest. The innkeeper usually extends to the public generally an invitation to enter his lobby and lounging rooms without charge, but it cannot be thought that one who avails himself gratuitously of these favors is a guest, or that the absolute liability of an innkeeper extends to articles of property he may bring with him.

"Generally the relation of innkeeper and guest arises when the guest registers and engages accommodations. We do not wish to be understood as saying that the relation may not arise before registering or engaging accommodation. No doubt it may. We have no doubt that the relation may arise at the time that baggage is intrusted to the innkeeper or his porter or bell boy, if the parties contemplate that accommodations shall be engaged within a reasonable time. Sasseen & Whitaker *v.* Clark, 37 Ga. 242; Coskery *v.* Nagle, 93 Ga. 696, 10 S. E. 491, 6 L. R. A. 483, 20 Am. St. Rep. 333. Flint *v.* Illinois Hotel Co., 149 Ill. App. 404. But we cannot hold that the act of handling a satchel to the porter of a hotel makes the owner of the satchel a guest, when he intends neither to eat nor sleep at the hotel or to pay therefor, but intends only to avail himself, without expense, of the facilities and comforts which the innkeeper furnishes gratuitously to the public at large. Straus *v.* Co. Hotel & Wine Co., 12 L. R. Q. B. 27; Baker *v.* Bailey, 103 Ark. 12, 145 S. W. 532, 39 L. R. A. (N. S.) 1085. See Tulane Hotel Co. *v.* Holohan, 112 Tenn. 214, 79 S. W. 113, 105 Am. St. Rep. 930, 2 Ann. Cas. 345; Brewer *v.* Caswell, 132 Ga. 563, 64 S. E. 674, 23 L. R. A. (N. S.) 1107, 131 Am. St. Rep. 216, 16 Ann. Cas. 936. For one who has neither been at an inn nor intends going there does not become a guest by merely sending his goods to be taken care of by the innkeeper. Grinnell *v.* Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663.

"In this case plaintiff manifested no purpose of becoming a guest at defendants' hotel until after his baggage was lost, and the relation of innkeeper and guest did not arise until that time. At the time of the loss of plaintiff's baggage the defendants were nothing more than gratuitous bailees, and the case must be disposed of on the principles of law applicable to bailments of that class. Baker *v.* Bailey, 103 Ark. 12, 145 S. W. 532, 39 L. R. A. (N. S.) 1085."

Libel and Slander— Privileged Communication—Grand Union Tea Company v. I. C. Lord, C. C. A., 4 Ct. (Va.).—The court in the principal case held the claim that the words spoken were a privileged communication, or of that nature, could not be sustained. In that case L. lived in M.'s house and the relations between them were inferentially shown to be those of familiar friendship. The court said that, taking into account the circumstances of the situation, it was perhaps not unnatural for V. to tell M. that there was a shortage in L.'s stock of goods and cash, but that V. owed no duty to M. to make such a statement, and that no aspect of the case brings the words spoken to him within the doctrine of privilege. (Dillard *v.* Collins, 66 Va., 343; Farley *v.* Thalhimer, 103 Va., 504; Williams Printing Company et al. *v.* Saunders, 113 Va., 156).

Municipal Corporations—Governmental Duties—Liability for Injury—Pesthouses—Butler v. Kansas City, 155 Pac. 12.—In the principal case the Kansas Supreme Court held that, where a municipal corporation maintains a pesthouse for the treatment and isolation of persons who have been exposed to or affected with smallpox, it performs a governmental duty and applied the rule that the governmental agencies of the state are not liable in an action of tort for either misfeasance or nonfeasance to an action against a city to recover damages for personal injuries resulting from the defective condition of the floor of a pesthouse, where plaintiff, who was affected with smallpox, was confined by the city authorities.

The court in the principal case said: "It is a general rule that the governmental agencies of the state are not liable in an action of tort for either nonfeasance or misfeasance. Fowler *v.* Common Council of Alexandria, 3 Pet. 398, 7 L. Ed. 719; Maxmilian *v.* Mayor, 62 N. Y. 160, 164, 165, 20 Am. Rep. 468. Judge Dillon states the law as follows:

"The power or even duty on the part of a municipal corporation to make provision for the public health and for the care of the sick and destitute appertains to it in its governmental or public, and not in its corporate, or, as it is sometimes called, private, capacity. And therefore where a city, under its charter, and the general law of the state enacted to prevent the spread of contagious diseases, establishes a hospital, it is not responsible to persons injured by reason of the misconduct of its agents and employees therein." 4 Dillon's Municipal Corporations (5th Ed.) § 1661.

Among the cases cited in the notes which are directly in point, see Evans *v.* Kankakee, 231 Ill. 223, 83 N. E. 223, 13 L. R. A. (N. S.) 1190; Sherbourne *v.* Yuba County, 21 Cal. 113, 81 Am. Dec. 151; Summers *v.* Daviess County, 103 Ind. 262, 2 N. E. 725, 53 Am. Rep. 512; City of Richmond *v.* Long's Adm'rs, 17 Gratt. (Va.) 375, 94 Am. Dec. 461; Murtaugh *v.* St. Louis, 44 Mo. 479.

In Barbour *v.* Ellsworth, 67 Me. 294, a well person was taken to a hospital for smallpox where he contracted the disease. Alleging that he had not been suitably or sufficiently cared for, he sued the city for damages, and it was held there was no liability. In Lynch *v.* North Yakima, 37 Wash. 657, 80 Pac. 79, 12 L. R. A. (N. S.) 261, it was held that the city was not liable for the act of a policeman who took a person exposed to smallpox into a building occupied by the fire department, thereby exposing the employees to contagion.

"The duty of a municipal corporation to conserve the public health is governmental, and it is not liable for injuries inflicted while performing such duty. 6 McQuillin's Municipal Corporations, § 2669."

Pledge and Collateral Security—Failure to Account for Collateral —Defense—Set-Off.—Can the failure of the plaintiff to produce and account for collateral security be pleaded in defense of a suit on the note or debt to secure which the collateral was given.

In one of the leading cases on the question, it was said:

"Where an action is brought to recover a debt for which collateral security has been given, it is incumbent on the plaintiff either to produce and restore the collateral security, or to account satisfactorily for its nonproduction." Stuart *v.* Bigler, 98 Pa. 80. See, also, Spalding *v.* Bank of Susquehanna, 9 Pa. 28; Bank of U. S. *v.* Peabody, 20 Pa. 454; Ocean Nat. Bank *v.* Fant, 50 N. Y. 474; Smith *v.* Rockwell, 2 Hill (N. Y.) 482.

There are, it is true, some decisions holding that the pledgor cannot set up, in defense to a suit upon a debt, a claim for the value of the pledge, by way of set-off or recoupment. See Winthrop Savings Bank *v.* Jackson, 67 Me. 570, 24 Am. Rep. 56.

However, the greater weight of authority seems to support the right of a pledgor to sue for a conversion of the pledge, as a defense to an action on the debt, and that he may make this defense by way of counterclaim. See Cass *v.* Higenbotam, 100 N. Y. 248, 3 N. E. 189; Carrington *v.* Ward, 71 N. Y. 360; Haskell *v.* Africa, 68 N. H. 421, 41 Atl. 73; Barnes *v.* Bradley, 56 Ark. 105, 19 S. W. 319; Donnell *v.* Wyckoff, 49 N. J. Law, 48, 7 Atl. 672; Bank, etc., *v.* Marshall, (C. C.) 11 Fed. 19.

In the case of Donnell *v.* Wyckoff, supra, it was said:

"The loan of the money and pledge of the stock as collateral security are parts of the same transaction, and the value of the property wrongfully converted and the amount of the debt can both be as readily ascertained in the action by the pledgee for the debt, as in the action by the pledgor for the conversion of the pledge. In view of the fact that transactions of borrowing money on collateral securities have become common, and in large amounts, and that the securities pledged are usually such as are negotiable, and the pledge affected by blank indorsements, public policy requires the protec-

tion of the borrower from the consequence of the wrongful disposition of the property pledged, as far as is consistent with rules of law and the forms of action. To deprive the creditor of all remedy for his debt, because by inadvertence he has made an unlawful disposition of the pledge— it may be of less value than the debt—would be unjust. Equally unjust would it be to compel the debtor to pay the debt in full in the face of the wrongful disposition of the property pledged, and then put him to an action of trover against the same party, who may be insolvent and incapable of satisfying the judgment against him. The injustice that might be done to the pledgee in an action of trover for the wrongful conversion of the pledge—the debt for which it was pledged being unpaid—is obviated by allowing the amount of the debt in abatement of damages, on the theory that to that extent the property pledged has been applied to the pledgor's use. On the same principle the value of the pledge wrongfully converted may be treated as payment pro tanto, or in full in an action for the debt."

"Where collateral has been given as security for the payment of a note, in a suit upon the note the debtor may plead as a counterclaim or set-off the actual value of any of such collateral which the creditor has converted to his own use, or the value of any such security which has been released, dissipated, or diverted from the purpose for which he held it." Joyce's Defenses to Commercial Papers, § 613, p. 768, citing Hawley *v.* Brownstone, 123 Cal. 643, 56 Pac. 468; Jennings *v.* Moore, 189 Mass. 197, 75 N. E. 214; Richardson *v.* Ashby, 132 Mo. 238, 33 S. W. 806; Carson *v.* Buckstaff, 57 Neb. 262, 77 N. W. 670.

In Richardson *v.* Ashby, supra, the Supreme Court of Missouri said:

"In an action on a note it appeared that at the time the defendant executed it she pledged the plaintiff's intestate other notes as collateral security; that the deceased had repledged them as collateral on a note made to himself, and that plaintiff could not produce them; that defendant admitted her liability on her note, and in a counterclaim prayed judgment against the estate of deceased for the difference between the value of the collateral notes and the sum due from her. Held, that the repledging of the notes was a conversion, and that defendant was entitled to the judgment prayed for."

In the case of Waring *v.* Gaskill, 95 Ga. 731, 22 S. E. 659, where the plaintiff, in violation of his contract, sold certain collaterals without giving the notice as required by the contract, it was said:

"Where a suit was brought for the recovery of the balance due upon the note after giving credit for the net proceeds of the sale of the collaterals, it was the right of the defendant to plead in recoupment the conversion; and in adjusting the account between the parties, he was entitled to credit for the actual value of the collat-

erals at the time of the sale. This defense could be made without demanding restitution of the collaterals, or tendering payment of the debt thereby secured."

See also, in this connection Harrell *v.* Citizens' Banking Co., 111 Ga. 846, 36 S. E. 460; Halliday *v.* Bank of Stewart County, 112 Ga. 461, 37 S. E. 721; Whigham *v.* Fountain, 132 Ga. 277, 63 S. E. 1115.

In Halliday *v.* Bank of Stewart County, supra, it was said:

"Where one deposits property with another as security for the payment of a debt, such property is thereafter held in pledge, but the effect of the transaction is not to divest the title of the pledgor."

The pledging of collateral security for loans is very common. It is not uncommon for unscrupulous persons to lend money on such securities, and it would be possible for such a one, to obtain notes, secured by collaterals, and then to discount the notes to one person, and convert the collaterals to his own use, and in such a case the only remedy of the pledgor would be to pay his note and bring an action of trover against the original payee for the conversion of his collaterals, provided the payee could be found.

Stocks and Stockholders—Stockholders' Liability—Trust Fund Theory—Set Off.—There is an irreconcilable conflict between the decisions of the several states on the question of the right of a stockholder, when sued by a receiver or assignee for the benefit of creditors, on his unpaid stock subscription, to set off any debt which the corporation may owe him against his debt to the corporation, and a like conflict is found as to his right to do so when sued on a statutory liability to contribute a further sum to meet the corporation's debts.

The authorities which deny this right are collected in the note to Sec. 5854 of Thompson on Corporations, 2d Edition, and the authorities which admit the right are collected in the note to Section 5855.

A number of the states take the puzzling position that, while the stockholder, when sued by a creditor, under statutory authority, may set off the corporation's debt to him, against his liability to the corporation, or his statutory liability to its creditors, after the corporation has failed and its assets have proved insufficient to pay its debts, he may not set off such debts to him when sued by the receiver or assignee, on behalf of all the creditors. Of course, all states which admit his right to a set off in the latter case, also admit his right to a set off when sued by a creditor. The following cases admit the right to set off in a suit by a creditor, though some deny the right where the suit is by the receiver or assignee. Garrison *v.* Howe, 17 N. Y. 458; Mathez *v.* Neidig, 72 N. Y. 100; Agate *v.* Sands, 73 N. Y. 620; Wheeler *v.* Millar, 90 N. Y. 353; Slee *v.* Bloom, 12 Johns. (N. Y.) 456; ——— *v.* ———, 14 Daly (N. Y.) 334; Christensen *v.* Colby, 43 Hun (N. Y.) 362; Pierce *v.* Security Co., 60 Kan. 164;

Abbey *v.* Long, 44 Kan. 688; Musgrove *v.* Glenn Elder Assn., 5 Kan. App. 393; Kendall *v.* Underhill, 8 Kan. App. 521; Fidelity Ins. Co. *v.* Mechanics Saving Bank, 97 Fed. 297; Crocker *v.* Ball, 59 Pac. (Cal.) 691; Ball *v.* Anderson, 196 Pa. St. 86; Broadway Nat. Bank *v.* Baker, 176 Mass. 294; Sargent *v.* Stetson, 181 Mass. 371; Washington Sav. Bank *v.* Butchers and Drovers Bank et al., 130 Mo. 155; German *v.* Benton, 79 Mo. 148; Webber *v.* Leighton, 8 Mo. App. 502; Manville *v.* Roever, 11 Mo. App. 317; Merchants Ins. Co. *v.* Hill, 12 Mo. App. 148 (affirmed 86 Mo. 466); Stinebaker *v.* National Restaurant Co., 133 Mo. App. 350; Hood *v.* French, 37 Fla. 117; Cahill *v.* Big Gun, etc., Assn., 94 Md. 353; Emmert *v.* Smith, 40 Md. 123; Webber *v.* Fickey, 47 Md. 199; Briggs *v.* Penniman, 8 Cow. (N. Y.) 387; Markell *v.* Ray, 75 Minn. 147.

No sound reason is given in any of these decisions for drawing the distinction which they find between an action by a single creditor or several creditors suing for themselves and not for all the creditors, against one or more stockholders. The only distinction between such an action and one by a receiver or assignee of the corporation, is that, in the first case, the creditor who moves first gets an advantage over the others by his superior diligence, while, in the latter case, all creditors stand upon an equal footing. The action by a stockholder, in its essence, is in the nature of a garnishment of the corporation's debtor, and he enjoys, under the statute, the advantage which an attaching creditor obtains over the creditor who sleeps upon his rights. The right to bring such an action is purely statutory, and would seem to inflict a hardship on the stockholder sued, if the total of the debts of the corporation are less than the totals of the debts of the stockholders to it, since the stockholder sued would be compelled to pay in full, while others would escape with only a partial payment or none at all. Doubtless the right to contribution against the other stockholders would be recognized by the courts in such a case. But in all such proceedings, the right of the stockholder to set off the debt of the corporation to him has been fully recognized, and he can be required to respond to no greater extent than the balance of his debt to the corporation over and above his debt to it.

Reason and justice would seem to require that the stockholder who has not paid his stock subscription, but who has loaned money to the corporation, or paid its debts, or sold it goods, should be allowed to set off against the receiver or assignee of the corporation any such debt, just as he would be allowed to do if the suit were by the corporation and not by the receiver or assignee. But the "trust fund" theory denies to him this right. The assets of the corporation, it is said, constitute a trust fund for the benefit of all creditors, and to allow one stockholder to set off against his indebtedness to the corporation its debt to him, would be to give him a preference over

other creditors, whose claims are just as valid as his claim. In one of the cases above cited (German *v.* Benton, 79 Mo. 148), this sophistical distinction was effectually disposed of as follows:

"It is next argued that if a stockholder is permitted to bring forth his claims against the company as an offset against his liability to creditors, he would in this manner obtain payment of his demand in preference to other creditors. Accordingly, he is entirely excluded by this course of reasoning as a creditor and the trust fund in dispute is handed over entirely to the suing creditor, who thereby obtains full preference and satisfaction of his demand, thus obtaining the advantage which was denied to the other creditor, merely because he is a stockholder. It is difficult to perceive on what principle one creditor should be preferred to another. The unjustness of the inequality is as apparent when it is suffered by the one as by the other."

It has seemed to escape the advocates of the trust fund theory, with its corollary of the exclusion of the right to set off on the part of the stockholder, that the rule they affirm radically alters the contractual relation of the stockholder to the corporation. His contract is to pay for his stock, and nothing more, and like any other debt, it can be paid by discharging the debts of the corporation, with its consent, selling it goods, etc., and when sued on his subscription, the proof of such transactions would defeat the corporation's action to that extent. But the failure of the corporation, under this rule, deprives him of his defense. His debt to the corporation remains undiminished, while its debt to him becomes contingent on its funds proving sufficient to discharge all its debts. Can anything more illogical be imagined?

There are, however, a number of states which reject the trust fund theory, or rather this deduction from it. In Maine, the legislature, perceiving the injustice wrought by it, expressly provided (Sec. 90 Code of 1903) that a stockholder, when sued by the receiver of a corporation on his stock subscription, might set off any claim which he might have against the corporation, in contract or in tort, absolute or contingent, and the provision has been applied in all its breadth in several cases. Appleton *v.* Turnbull, 84 Me. 72; Morgan *v.* Howland, 89 Me. 488.

Tennessee, without legislation, has followed the rule of allowing a set off, even where the debt of the corporation had been acquired by the stockholder after the failure of the corporation and after his debt on his stock had been established by an action by the receiver of the corporation—an extension of the rule which can hardly be commended. Marr *v.* Bank, 4 Lea (Tenn.) 578.

The right of the stockholder to set off in an action by the receiver has been upheld in Ohio where the stockholder had on deposit in the bankrupt bank a balance to his credit, which he was

allowed to set off against his obligation under his subscription to its capital stock. Niles *v.* Olszak, 87 Oh. St. 329.

This rule has also been followed in Wisconsin (Graebner *v.* Post, 119 Wis. 392), and in Georgia (Boyd and Son *v.* Hale, 56 Ga. 563).

The opponents of the doctrine of the right of the stockholder to set off a debt from the corporation to him have relied on the decision of the Supreme Court of the United States, in Sawyer *v.* Hoag, 17 Wall (U. S.) 610, as their sheet anchor. But that court has departed very decidedly from its early adoption of the trust fund theory, even to the extent of sustaining the right of a corporation to sell its stock for less than its face value, in the payment of its debts, and even to procure the building of its road by the issue of stock in excess of the value of the work. Clarke *v.* Bever, 139 U. S. 96, and Fogg *v.* Blair, 139 U. S. 118. It is true that the question of set off did not arise in these cases, but they dispose of another corollary of the trust fund doctrine—that one which becomes the owner of corporate stock is obligated to pay its full face value to the company, no matter what the contract between him and it may be—a theory which furnishes the basis for a large proportion of stockholder's liability suits.

The trust fund theory seems to owe its name and birth to Judge Story, who announced it in Wood *v.* Dummer, 3 Mason (U. S.) 308 (1855). There the stockholders of a corporation, in advance of the expiration of its charter, divided among themselves three-fourths of its capital stock (meaning assets) so that when it was wound up there was a deficiency of assets to pay its debts. This was held to be a fraud on the creditors, and they were required to make good the deficiency. There is here nothing to differentiate their obligation to the corporation from any other debt which they might owe it. The creditors were entitled to have their debts paid out of the assets of the corporation, and, as the stockholders had made away with them, they were required to return what they had appropriated, just as an individual or firm which might have abstracted from the business a part of the assets would be required to do.

To attempt to impart to the debt of a stockholder to the corporation a quality different from any other debt which he may owe it, by calling it a trust fund, is a misuse of words. By his subscription, he merely agrees to pay for certain property which he purchases from the corporation, its corporate shares. and his obligation to it is no more sacred than any other obligation which he may incur to it or it may incur toward him. Any other debtor to the corporation can set off any debt which it owes to him (Van Wagoner *v.* Paterson Gas Light Co., 23 N. J. L. 283,) but the stockholder may not. The trust fund theory thus is not only opposed to justice and common sense. but is directly injurious to the corporation, by discouraging the stockholder from coming to the aid of the corporation when in

need or from doing business with it in any way, from fear that, if it fails, he will stand in worse case than others who are both debtors and creditors.

While the rule which would deny to a stockholder the right to set off the corporation's debt to him against his debt to it on his unpaid stock subscription, seems to be backed by more decisions than the opposite rule, it is a modern invention and is lacking in logic as in justice, a fact which has prevented its adoption in the jurisdictions from which we have cited decisions, and probably in others which have escaped our attention. And there are probably statutes in other of the corporation-forming States analogous to that of Maine, which affirm the sounder doctrine.

Streets and Highways—Duty to Look before Crossing Street.—A wayfarer is not at liberty to close his eyes in crossing a city street. His duty is to use his eyes and thus protect himself from danger (Barker *v.* Savage, 45 N. Y., 191).

The law does not say how often he must look, or precisely how far, or when or from where. If, for example, he looks as he starts to cross, and the way seems clear, he is not bound as a matter of law to look again. The law does not even say that because he sees a wagon approaching he must stop till it has passed. He may go forward unless it is close upon him; and whether he is negligent in going forward will be a question for the jury. If he has used his eyes and has miscalculated the danger he may still be free from fault (Buhrens *v.* Dry Dock, etc., R. R., 53 Hun. 571; 125 N. Y. 702).

In Knapp *v.* Barrett, 6 Y. Ct. of App. Nov. 16, 1915, an action for personal injuries from being struck by the defendant's wagon while the plaintiff was going from a street car to the sidewalk the charge that the law did not require that the plaintiff should look at all; that "the law does not provide that he should do any particular, specific thing, only in general terms that he should exercise ordinary care for his own safety," was held to be error, as a failure to exercise his faculty of sight under such circumstances would be negligence as matter of law.

But it is a very different thing to say that he is not bound to look at all. We have repeatedly held that one who crosses a city street without any exercise of his faculty of sight is negligent as a matter of law (Barker *v.* Savage, supra; Peterson *v.* Ballantine & Sons, 205 N. Y. 29; Perez *v.* Sandrowitz, 180 N. Y. 397; McClain *v.* Brooklyn City R. R., 116 N. Y. 459, 470; Reed *v.* Met. St. Ry., 180 N. Y. 315; Volosko *v.* Interurban St. Ry., 190 N. Y. 206; Zucker *v.* Whitridge, 205 N. Y. 50; Mastin *v.* City of N. Y., 201 N. Y. 81).

To escape the consequences of such negligence he must prove that even if he had looked the accident would still have happened. He

is not entitled to damages where it appears that "unconscious and observant of the situation, he walked into the approaching team" (Perez *v.* Sandrowitz, 400, supra).

Moebus *v.* Herrmann (108 N. Y. 349) and Baker *v.* Close (204 N. Y. 92) do not sustain a ruling that the plaintiff was not negligent as a matter of law, even though he walked blindly in front of the defendant's wagon. They give no support to so extreme a view. It is true that the rule applicable to steam railroads is not applicable to other crossings. The traveler approaching such a railroad is required "to make vigilant use of his eyes and ears to ascertain if there is an approaching train," and "if by such use of these faculties, while approaching, the vicinity of such a train may be discovered in time to avoid a collision, the omission to exercise them is contributory negligence" (Davis *v.* N. Y. C. & H. R. R. R., 47 N. Y. 400; Judson *v.* Central Vt. R. R., 158 N. Y. 597).

There are many cases where it might be possible by a vigilant use of the faculties of sight and hearing to discover an approaching wagon in time to avoid a collision, and yet the traveler would not be chargeable with contributory negligence for failing to discover it. The vigilance, in brief, does not have to be so extreme and constant. One may often look when crossing a city street without turning one's head at all. A sufficient space to give a reasonable assurance of safety may be at all times within one's range of vision. Some use of one's faculties, however, there must be, and it is error to instruct a jury that one who has made no use of them whatever may still be free from fault. What was said in Moebus *v.* Herrmann and in Baker *v.* Close must be read in the light of the fact of those cases. In Moebus *v.* Herrmann the court was dealing with an accident to a child of seven years at the crossing of the street, and all that the court held was that the degree of vigilance to be exacted might be affected by the situation and surrounding circumstances.

In Baker *v.* Close the evidence was that the plaintiff had looked up and down near the middle of the street, but had failed to look again before reaching the curb, and the question was whether there was any evidence to take the case to the jury. These facts appear more fully in the report of the case at the Appellate Division (137 App. Div., 529). The court said in effect that the extent to which one must look may not be defined in advance by any hard and fast formula, but must be measured by the circumstances of the particular case. Since Moebus *v.* Herrmann and Baker *v.* Close were decided, there have been many cases in which it has been held that a traveler's failure to use his faculty of sight at all is contributory negligence as a matter of law. If the traveler may rely to some extent on the assumption that care will be taken by the driver, the driver may also rely to some extent on the assumption that care will be taken by the traveler.

Theatres and Shows—Public Rights in Theatres.—The Law Journal (London) for April 8, 1916, contains the following note:

"Although until very recently most people considered that the purchaser of a theatre ticket had only contractual rights against the lessees, and must leave the theatre if requested at the risk of becoming a trespasser, it is now well settled that his position is a stronger one in law. He is the possessor of a license coupled with an interest, and therefore legally entitled to remain during the performance in his allotted place, provided he behaves properly and fulfills the conditions subject to which the license embodied in his ticket has been granted (Hurst *v.* Picture Theatres, Lim., 1915, 1 K. B. 1). The result is that it is no longer possible for the management simply to request a ticket holder to leave, and on his refusal to eject him as a trespasser. Such forcible removal is now clearly recognized by the law as an assault, and therefore the subject either of civil or of criminal proceedings. In Gerard *v.* Proprietors of Drury Lane Theatre, at the Westminster County Court on April 3, Judge Woodfall had to deal with a case of this kind. The plaintiff visited a theatre and, there being no vacant seat for him, stood at the back of the gallery. An attendant asked him to leave, and on his refusal called a policeman, who assisted to forcibly remove him. At the box office he received an apology from the acting manager, who said that the attendant had acted in error and asked him to return, which, however, he refused to do. Clearly the visitor was not a trespasser and hence his removal was an assault. The jury awarded him £200 as damages, an amount beyond the jurisdiction of the court."

This decision follows in line with Hurst *v.* Picture Theatres, Lim. (supra), which was discussed in this place at the time when it was rendered. The Hurst case practically overruled Wood *v.* Leadbitter (13 M. & W., 838), which had stood in the way of administering the law as to mutual rights of the public and the proprietors of theatres, according to common sense and justice, for a long number of years. In New York, on the other hand, in Burnham *v.* Flynn (189 N. Y. 180), and still more recently in Woolcott *v.* Shubert (217 N. Y. 212) the anomalous mere license doctrine has been radically reasserted. In the Burnham case it was decided that a holder of a ticket who was refused admission to a theatre was entitled to recover in an action for breach of contract only the amount paid for the ticket and the necessary expenses incurred in order to attend the performance. The particular point decided in Woolcott *v.* Shubert was that the Civil Rights Act does not prevent the proprietor of a theatre from excluding a person on grounds other than those to which such act refers. In that case it was alleged that plaintiff had been excluded from one of defendants' theatres, and his general exclusion was threatened because as a dramatic critic he had

published an unfavorable criticism upon a production controlled by defendants.

It is conceded that a theatre is "affected by a public interest," and we think it is going counter to all legitimate analogies of the law to cleave to the antiquated doctrine of Wood *v.* Leadbitter. Our contemporary, Law Notes, in its edition for April, 1916, referring to the decision in Woolcott *v.* Shubert, suggests that "the public have the remedy in their hands if they choose to exercise it. The common law presents no terrors to the average Legislature, and it may attach such conditions to the right to conduct amusement enterprises as it may see fit so long as they are within reason." We approve the suggestion of legislation to meet the situation. Woolcott *v.* Shubert expounds the common-law rights of the proprietors of theatres, and, under recent broad interpretations of the police power, we have no doubt that legislation prescribing regulations that are up to date and beneficial to the public as a condition to maintaining theatrical enterprises would be valid. Nobody would question the authority for moral censorship of theatres, and we think the intellectual interests of the public demand recognition of the right of free, intelligent criticism of performances. There is no good reason why a proprietor of a theatre should not be required to admit any member of the public who pays, or offers to pay, for his ticket and conducts himself in a proper manner.

Warehouseman—Act of God—Unusual Tide—Liability.—That a tide which injured property in a warehouse was the highest for a period of nearly sixty years is held in Hecht *v.* Boston Wharf Co., L. R. A., 1915D, 725, not to relieve the warehouseman from liability for the injury, if the floor of the warehouse was below the height reached by the tides several times during that period, and lower than was regarded as safe by experts in the locality.